

505 Fifth Avenue South
Suite 610
Seattle, Washington
98104

phone 206.274.2800
fax 206.274.2801

www.newmanlaw.com
info@newmanlaw.com

November 29, 2004

United States Federal Communications Commission
445 12th Street SW
Washington, DC 20554

**Re: Reply Comments of Blue Audio, Inc. to Notice of
Proposed Rulemaking (69 Fed. Reg. 61184)**

Docket Nos. 04-244 and 98-170

To the Commission:

This firm represents Blue Audio Inc. ("Blue Audio"), on behalf of whom we submit this reply to the comments submitted by AT&T Corp. ("AT&T") in response to the request of the Federal Communications Commission (the "Commission") for comments as set forth in the Notice of Proposed Rulemaking published at 69 Fed. Reg. 61184 (the "NPRM").

Blue Audio is in the business of providing audioconference services ("Audioconference") to consumers. The NPRM sets forth proposed regulations (the "Proposed Rules") which would regulate Audioconference services in the same manner as pay-per-call services. Audioconference is a service whereby consumers place a call to a domestic United States telephone number and, through a conference bridge supplied by the service provider, are connected with other United States callers for the purpose of social interaction. Blue Audio does not charge landline consumers for its services. Rather, the only fee a consumer incurs is the regular transport fee the consumer's local or long distance carrier charges. Accordingly, there is no incremental charge to the consumer for Audioconference services.

AT&T's arguments that consumers require procedural protections for Audioconference services are unavailing. AT&T provides two rationales in support of its conclusion: first, AT&T submits that the content of consumers on Audioconferences is, in their opinion, "objectionable"; and second, because of alleged increased charges to consumers. AT&T also urges, without support, that the FCC adopt a rule that all revenue-sharing arrangements are presumptively improper. Finally, AT&T does not address the fact advanced by PaymentOne Corporation ("PaymentOne") that the additional billing protections under the Proposed Rules would

result in the loss of access to services for minorities and lower income consumers.

AUDIOCONFERENCE SERVICES DO NOT REQUIRE PROCEDURAL SAFEGUARDS

AT&T argues that allowing “audiotext and other pay-per-call services through” non-900 numbers “subverts the objectives of TDDRA” because of the allegedly “objectionable content” in Audioconferences. However, neither AT&T nor any other party submits any evidence that Audioconference providers generally offer “objectionable content” or articulates the standard by which the Commission should determine that conference calls are objectionable. Even if such evidence was before the Commission, AT&T’s proposed rule is an improper content-based policy (*i.e.*, targeting “objectionable content”). “Content-based regulations are presumptively invalid.” R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992). While Audioconference providers have terms of service which clearly prohibit the use of objectionable content, in truth, a conference bridge provider cannot always monitor and enforce the use of language which some consumers may find objectionable. All content in an Audioconference is provided by consumers and the service provider can only screen the most clearly objectionable content.

AT&T also urges that failure to pay bills for Audioconference services should not be subject to disconnection for nonpayment. AT&T’s concern fails to take into account that Congress explicitly defined services with respect to which consumers were accorded protection against disconnection—*i.e.*, pay-per-call services. Audioconference providers do not offer pay-per-call services as defined by Congress. Accordingly, Blue Audio should not be subject to these regulations. Neither Blue Audio nor any carrier charges any consumer a premium for the Audioconference service. Blue Audio’s customers do not require procedural safeguards any more than any consumer who makes any other regular telephone call to a friend or business associate.

REVENUE-SHARING ARRANGEMENTS ARE NOT TANTAMOUNT TO PAY-PER-CALL

AT&T argues the Commission should find revenue-sharing arrangements *per se* improper and that the Commission should treat services offered pursuant to these arrangements as pay-per-call services.

AT&T suggests that revenue-sharing arrangements play a “central role . . . in creating . . . harms to consumers’ interests”. AT&T believes carriers and end users somehow “fund” Audioconference services through “inflated access charges.” (AT&T Comments, pp 8-10.) AT&T notes that the “enormous volumes of traffic” over telephone numbers to Audioconference services (14.5 million minutes of traffic to

AT&T's lines between mid-February to mid-March, 2004¹) constitutes evidence that Audioconference services harm consumer interests. (AT&T Comments, p. 8.) To the contrary, these statistics support the proposition that consumers are interested in using Audioconference services because the services are inexpensive, entertaining, and informative.

AT&T is correct that in today's industry, Audioconference services are offered to end users at "ordinary long distance rates" (see AT&T Comments, p. 8).² This does not constitute harm to consumers, but instead represents a consumer victory. Indeed, Blue Audio's revenue-sharing agreements with carriers are ethical, legal, and not deceptive to consumers. Consumers pay only the standard fee associated with the call to the conference line, which consumers have learned to expect based upon the area code dialed.

THE PROPOSED RULES ADVERSELY AFFECT MINORITIES AND LOWER INCOME CONSUMERS

Blue Audio submitted in its comments that the billing structure contemplated under the Proposed Rules and those endorsed by AT&T would be cost prohibitive for Blue Audio and similarly situated Audioconference providers. Additionally, as PaymentOne describes in its comments, if the Proposed Rules become regulation, "a substantial portion of our population that cannot use — or chooses not to use — credit cards, will be denied access to important telecommunications services." (PaymentOne Comments, p. 2.) The brunt of this impact will be felt by lower income and minority consumers. PaymentOne cites data that approximately 50 million households in the US do not have credit cards. Additionally, the Hispanic community, for example, has "less than 40% credit card penetration." (*Id.* n. 4.) Blue Audio's customers fall disproportionately in these categories, and the Proposed Rules would thus exacerbate consumer harm from the perspective of those customers.

* * * * *

Because Blue Audio does not provide any so-called "objectionable content," the procedural protections suggested by AT&T with respect to Audioconference services cannot be justified on the basis of the content offered by Blue Audio. To the extent the

¹ It is telling that while AT&T cites to this information AT&T does not put forth any information regarding customer complaints with respect to these services. As stated in its initial comments, Blue Audio has not received a single customer complaint in its years of providing Audioconference services.


² In the instance of a local call and where the customer subscribes to an unlimited long distance plan these services are free to the customer; and in the instance of a long distance call these services are charged at the rate of the customer's usual long distance rate.

measures suggested by AT&T are based on the content of the services alone, these measures would run afoul of the First Amendment. Additionally, consumers do not need the procedural protections urged by AT&T with respect to Audioconference services any more than they need protections with respect to ordinary long distance and local telephone calls. Additionally, Audioconference services offered pursuant to revenue-sharing arrangements should not be considered *per se* problematic. The Proposed Rules should only cover situations in which revenue-sharing arrangements may be problematic, rather than broadly covering all revenue-sharing arrangements, even those such as Blue Audio's that present no ethical, legal, or other concerns. Finally, the billing protections suggested in the Proposed Rules should not apply to Audioconference services. Blue Audio customers, a substantial portion of whom are lower income and minority individuals lack credit cards and may be unable to access Blue Audio services as a result of the billing requirements suggested in the Proposed Rules.

We are happy to answer any further questions on behalf of Blue Audio, or to provide any additional information. Please contact the undersigned directly at (206) 274-2800 or via e-mail at derek@newmanlaw.com.

Very Truly Yours,

NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP

A handwritten signature in black ink, appearing to read 'D. Newman', with a horizontal line extending to the right.

Derek A. Newman
Venkat Balasubramani

cc: Blue Audio Inc.